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No. 89-1580

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TIMOTHY SCOTT SHERMAN, PETITIONER

v.

STATE OF MARYLAND, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The State's brief in opposition makes no effort to deny that numerous state courts of last resort would have reversed the conviction in this case. Indeed, the State concedes that there are "conflicts in the law on the subject of unauthorized crime scene visits by jurors" (Br. in Opp. 10) and that the decision below "can be said to conflict with the decisions of other state courts" (id. at 16), and that "a conflict regarding standards may exist" (id. at 17). The State grasps at straws in its effort to avoid the force of those concessions by persuading this Court that it should deny certiorari regardless of the merits of petitioner's claim. Thus, the State incorrectly argues that the petition is untimely; that the issues presented by

the petition were not raised below; that plainly inapposite decisions of this Court should be treated as controlling notwithstanding the numerous decisions of lower courts that have correctly reached a result different from the one that the State claims has been dictated by this Court; and that this Court should ignore the sharp conflict among lower courts because the decision below is "correct." None of those arguments offers a tenable basis for denying review.

1. The State argues (Br. in Opp. 2, 10-13) that the petition for a writ of certiorari is untimely. Although the State hints at other arguments,1/ the

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1/ The State implies (Br. in Opp. 11-12) that there may be some question about whether a petition for reconsideration is a "petition for rehearing" within the meaning of this Court's Rule 13.4. The State refrains, however, from actually making the plainly frivolous argument that Rule 13.4, which was designed to deal with cases com-
(Cont'd)

only timeliness argument that the State actually makes is that there is no procedure for seeking reconsideration of the denial of certiorari by the Maryland Court of Appeals. Therefore, the State argues, the time for seeking certiorari from this Court was not tolled while the Maryland Court of Appeals considered petitioner's petition for reconsideration.

The State's argument is wrong. The State cannot point to a single Maryland case stating that a petition for reconsideration of the denial of state certiorari is an unauthorized filing, and our own research has disclosed no such

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ing from the federal courts of appeals and the courts of more than 50 distinct state and territorial legal systems, tolls the time for filing a petition for a writ of certiorari if and only if practice in the relevant system requires that litigants denominate their reconsideration requests as "petitions for rehearing."

case. The State relies instead on the absence of express authorization for such a petition in the current Maryland Rules and on a tenuous inference from a former Maryland rule that excluded denials of certiorari from the express authorization of motions for reconsideration.

The State's effort to read between the lines of present and former rules, however, is contradicted by the case law of the Maryland Court of Appeals, the case law of this Court, and the day-to-day practice of the Maryland Court of Appeals.

To begin with, at least two recent Maryland cases refer to motions for reconsideration of denial of certiorari. See, e.g., Sherman v. Robinson, 319 Md. 445, 447 n.1, 573 A.2d 34, 35 (1990) (discussing this case: "[Timothy Sherman's] petition was denied October 10

[sic], 1989, as was his subsequent request for a reconsideration of the denial"); State v. Gorman, 315 Md. 402, 554 A.2d 1203, 1204 (1989) ("[t]his Court denied Gorman's petition for a writ of certiorari and denied his motion for reconsideration"). Neither of those cases contains any hint that such motions should not be filed, should not be received for filing, or are not considered on their merits. To the contrary, the Maryland Court of Appeals consistently denies -- rather than dismisses -- motions for reconsideration that it rejects. See Pet. App. 26a. As this Court recently stated in Missouri v. Jenkins, 110 S. Ct. 1651, 1662 (1990), in rejecting a technical argument much like Maryland's in this case: "The Eighth Circuit surely knows more than we do about the meaning of its orders, and we accept its

action for what it purports to be.". Here, the state court's action purports to be a denial on the merits, not a dismissal of an unauthorized filing.

Moreover, this Court has on at least one recent occasion granted a petition for a writ of certiorari in a case in which that petition was filed in this Court more than 60 days (see former Rule 20.1) after the denial of certiorari by the Maryland Court of Appeals but within 60 days after the Maryland court's denial of reconsideration of the denial of certiorari. Gorman v. Maryland, 480 U.S. 913 (1987) (No. 86-5699) (order granting the petition, vacating, and remanding for further consideration). That case arose before the current Maryland Rules took effect, and this Court's grant of certiorari suggests that the State is wrong even in its interpretation of the previ-

ous Maryland Rules. Certainly the Maryland Court of Appeals, on remand (State v. Gorman, supra), expressed no surprise that a petition for reconsideration of a denial of (state) certiorari had been filed and had been treated by this Court as tolling the time to seek (federal) certiorari.

Finally, the only available evidence we have, other than case law, of the day-to-day operations of the Maryland Court of Appeals suggests that the court routinely accepts petitions for reconsideration of denials of certiorari. On November 8, 1989, counsel for petitioner telephoned the clerk's office of the Maryland Court of Appeals specifically to inquire about the procedure for filing a petition for reconsideration of a denial of certiorari. The telephone call was referred to a Mrs. Hughes, who informed counsel

that such a petition is due within 30 days after the denial of certiorari and must be accompanied by a $25 filing fee. It is inconceivable that there would be an established filing fee for an unauthorized filing.2/

For these reasons, it is clear that the petition for reconsideration of the denial of certiorari in the Maryland Court of Appeals, although not specifically authorized by rule, was in fact an authorized pleading, treated as such by the Maryland Court of Appeals. It there-

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2/ Thus, counsel's good-faith reliance on the advice given by the Maryland Court of Appeals clerk's office would constitute "compelling reasons to countenance the untimely filing" (Br. in Opp. 13) even if the filing were untimely -- which it is not. As the State properly concedes (ibid.), the time for filing a petition for a writ of certiorari in a criminal case is not jurisdictional, and this Court could grant the petition for a writ of certiorari (and correct a very serious injustice) even if it believed the petition to be untimely.

fore tolled the time for petitioning for a writ of certiorari in this Court. The present petition for a writ of certiorari is timely and should be considered on its merits.

2. The State argues that petitioner did not sufficiently raise below the issues presented in the petition. Br. in Opp. 13-15. The State concedes, as it must, that petitioner couched his arguments below in terms of the Sixth Amendment to the Federal Constitution.3/ The State regards that as insufficient, however, on the ground that petitioner was not as specific in the courts below as he

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3/ The State neglects, however, to mention that the petition for reconsideration filed in the Maryland Court of Appeals recited much the same litany of constitutional rights as the present petition for a writ of certiorari. The scope of federal constitutional issues raised in a petition for rehearing is significant. Hathorn v. Lovorn, 457 U.S. 255, 262-265 (1982).

is here in enumerating the specific Sixth Amendment rights violated. The argument is utterly frivolous.

To begin with, the question before this Court is not whether petitioner's federal constitutional rights were violated, for the State does not and could not contest that it violates a criminal defendant's federal constitutional rights for a juror to make an unsupervised visit to the crime scene. See Pet. 21-25 & n.5; cf. Br. in Opp. 15-21 (discussing merits of the issue without ever denying that a constitutional violation occurred in this case). The single question raised by the petition is one of remedy: Given that a constitutional violation occurred, did the courts below properly conclude that petitioner was nevertheless not entitled to a new trial? Our petition, like the scores of cases on

which it relies, contains no elaborate discussion of the precise nature of the Sixth Amendment (and other federal constitutional) rights violated, but rather focuses on the proper cure for violation of those rights. Likewise, petitioner's briefs and arguments below cited the relevant federal constitutional provisions and then moved quickly on to the remedies question.4/ In these circumstances, the idea that the general references to the Sixth Amendment in the courts below did not suffice to preserve the issue is wholly untenable.

4/ At page 26 of his brief in the Court of Special Appeals, in arguing that the juror's site visit was reversible error, petitioner cited Smith v. Phillips, 455 U.S. 209 (1982). At page 27, in the course of the same argument, he cited Tanner v. United States, 483 U.S. 107 (1987); Mattox v. United States, 146 U.S. 240 (1892); and the Fifth, Sixth, and Fourteenth Amendments. The state court was amply on notice of the federal constitutional nature of petitioner's claim.

In any event, this Court has consistently distinguished cases in which the issue was not raised at all in lower courts -- in which cases review of the issue generally is barred -- from cases in which the issue was preserved but simply not elaborated. In the latter class of cases, this Court regularly has proceeded to review the issue on its merits. See, e.g., Taylor v. Illinois, 484 U.S. 400, 406-407 n.9 (1988) (Compulsory Process Clause claim sufficiently preserved by allegation of "constitutional" error and citations to decisions relying on Compulsory Process Clause); Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982) ("[o]ur jurisdiction does not depend on citation to book and verse"); cf. Webb v. Webb, 451 U.S. 493, 496 (1981) (issue not preserved when petitioner did not cite Federal Constitution

or any cases relying on the Full Faith and Credit Clause).

3. The State does not dispute in the slightest our contention that the decision below squarely conflicts with People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 229 N.E.2d 211 (1967) (and subsequent New York cases); Watkins v. State, 237 Ga. 678, 229 S.E.2d 465 (1976); and Commonwealth v. Price, 463 Pa. 200, 203-204, 344 A.2d 493, 494 (1975). It instead asks the Court to ignore the conflict by summarily rejecting the considered constitutional holdings of those courts as being inconsistent with the decisions of this Court in Remmer v. United States, 347 U.S. 227 (1954), and Smith v. Phillips, 455 U.S. 209 (1982). Br. in Opp. 15-16.5/

5/ It is more than a little surprising that the (Cont'd)

The State's argument misconstrues both the role of this Court in granting certiorari and the holdings of Remmer and Smith. This Court grants certiorari in order to determine which of two or more competing rules adopted in the lower courts better comports with the requirements of the Constitution as interpreted by this Court. Where, as here, the existence of a conflict is undeniable, a claim that the rule adopted by the highest courts of three States is inconsistent with this Court's precedents is no basis at all for denying certiorari.

State should invoke Remmer as a case supporting the denial of certiorari. Remmer requires that the government rebut a heavy presumption of prejudice (347 U.S. at 229), but the State does not and could not argue that any such presumption was applied in this case. See Pet. 17-21, 47-50. If the State means to suggest that Remmer's heavy presumption of prejudice was overruled by Smith v. Phillips, then the State has raised as issue on which the federal courts of appeals are in conflict, with the vast majority disagreeing with the State's position (see Pet. 51 & n.15).

Indeed, if the State were right (which it is not) that such a misunderstanding of this Court's precedents by the lower courts exist, that would be in and of itself a reason favoring a grant of certiorari in order to clear up the confusion.

Furthermore, neither Remmer nor Smith even remotely rejects a rule of automatic reversal whenever a juror makes an unauthorized visit to a crime scene whose physical description is in issue. See Pet. 34-35 & n.8. Indeed, neither Remmer nor Smith involved a crime scene visit. In Remmer, there was a communication by an outside person with a juror. Smith -- which is not a Sixth Amendment case at all -- involved potential juror bias shown by the juror's submission of an employment application to the prosecutor's office during the trial. Neither

case involved the unsupervised and intentional gathering of evidence by the juror by means outside the adversary process. Thus, the cases on which the State relies neither raised nor could have raised the inference (which we submit should be conclusive) that the juror's actions, by themselves, prove that the juror acted prejudicially by seeking information that the court or the parties chose not to submit, but that the juror thought it necessary to obtain before rendering a verdict. In short, the rule adopted by the New York, Pennsylvania, and Georgia courts in cases of this sort is fully consistent with the rules -- applicable to somewhat different situations -- followed in Remmer and Smith.

4. The State's last effort to defeat certiorari is an assertion that the decision below comported with proper

constitutional standards. Br. in Opp. 16-21. That assertion consists of a claim that the court below did in fact require the State to demonstrate the absence of prejudice (id. at 17-20) and a rehash of the State's reasons for claiming, although there is no evidence at all on the subject, that it met that burden (id. at 20). As to the latter point, we have already discussed in the petition (at 16-17, 19, 48-50) the reasons why a no-prejudice determination is simply impossible in this case if the burden is placed, as the State apparently concedes it should be (Br. in Opp. 19), on the State to disprove prejudice beyond a reasonable doubt. The State has raised nothing new and we will not elaborate the point further.

It is necessary, however, to respond to the State's insupportable contention

that the burden of proof was properly placed in this case. The opinion of the court below makes absolutely no reference to putting the burden of proof on the State; instead, it contains a single paragraph discussing prejudice followed by a single paragraph discussing the abuse-of-discretion standard. Pet. App. 15a-16a; see Br. in Opp. 8-9. The "prejudice" paragraph cites only one (civil) case -- Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984) -- and in that case the Maryland Court of Appeals explicitly "reject[ed] the rule which presumes prejudice." Id. at 416, 470 A.2d at 807. The case on which the State relies heavily (Br. in Opp. 17-19) -- Eades v. State, 75 Md. App. 411, 541 A.2d 1001, cert. denied, 313 Md. 611, 547 A.2d 188 (1988) -- is not cited in the "prejudice" paragraph, but only in the

"abuse of discretion" paragraph, and there solely and expressly for the proposition that "[t]he grant or denial of a motion for new trial rests within the sound discretion of the trial judge." Pet. App. 16a.6/ It is abundantly clear that the court did not derive its prejudice test from Eades, but, to the extent it applied any test at all (other than abuse of discretion), derived that test from Wernsing, which rejects a presumption of prejudice.

Aside from any inferences that may be drawn from the cases that the court cited, it is crystal clear from the opin-

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6/ Reviewing the trial court's determination only for abuse of discretion in a case of this sort is itself error of constitutional dimension, as the Ninth Circuit has held. See Pet. 42 (citing Marino v. Vasquez, 812 F.2d 499, 504-507 (9th Cir. 1987)); see also Remmer v. United States, 350 U.S. 377 (1956) (unanimously finding prejudice despite contrary determination of the trial court).

ion that the court below did not require the State to rebut any presumption of prejudice. The court's review of this point was cursory and characterized by deference to the trial judge, who in turn had denied petitioner's new trial motion without any substantive input from the State. Furthermore, the facts discussed in the petition show that only a mockery of the presumption of prejudice would allow a determination of successful rebuttal in this case. The State's "rebuttal" of the presumption consists of nothing more than the assertion that the evidence gathered by the errant juror was "cumulative." Br. in Opp. 20. To say that such an unelaborated assertion rebuts the presumption of prejudice is to say that there is no presumption at all. That is not the law.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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